

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 11,776

JUL 15 1953

PHILIP GOLDMAN, *Appellant*,

v.

PHILIP YOUNG, Chairman, U. S. Civil Service Commission, and ARTHUR E. SUMMERFIELD, Postmaster General, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

CARL L. SHIPLEY,
Attorney for Appellant,
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Washington, D. C.

July 15, 1953.

No. 11,776

QUESTION PRESENTED

Whether the complaint of a civil service employee which alleges that he was dismissed in bad faith, and not accorded his statutory right to reasonable time to answer charges, or to a specific and detailed list of charges, or a copy of said charges, and that he was penalized twice for the same offenses, raises genuine issues of material fact.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,776

PHILIP GOLDMAN, *Appellant*,

v.

PHILIP YOUNG, Chairman, U. S. Civil Service Commission, and ARTHUR E. SUMMERFIELD, Postmaster General, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia granting appellees' motion for summary judgment against appellant. This Court has jurisdiction pursuant to 28 U. S. Code 1291.

STATEMENT OF THE CASE

On September 8, 1952, appellant filed a complaint in the lower court asking for a declaratory judgment that he had been dismissed from his civil service position as a postal carrier in violation of his statutory rights and in bad faith. On March 12, 1953, the trial court granted appellees' motion for a summary judgment.

FEDERAL RULES INVOLVED

The applicable rules, in pertinent part, are:

Rule 56. Summary Judgment:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 8(d). Effect of Failure to Deny:

"Averments in a pleading * * * are admitted when not denied * * *."

SUMMARY OF ARGUMENT

Appellant's complaint below raised genuine issues of material fact and could not be disposed of by granting appellees' motion for summary judgment.

ARGUMENT

The only question to be decided on this appeal is whether there was a genuine issue as to any material fact alleged in appellant's complaint. If there was, then the trial court was in error in granting defendant's motion for summary judgment. The rules governing the granting of summary judgment motions are set forth in detail in *Dewey v. Clark*, 86 U. S. App. D. C. 137, 180 F. 2nd 766. Both Federal Rule of Civil Procedure 56 and *Dewey v. Clark*

state very clearly that such a motion will be granted only if there is no genuine issue of fact. This Court has applied the rule in cases involving civil service employees by application of the same yardstick as in other cases, e. g. *Hunter v. Mitchell*, 86 U. S. App. D. C. 121, 180 F. 2nd 763, where the rule is stated as follows:

“Upon a motion for summary judgment it is no part of the Court’s function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. * * * *All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment.*” (Emphasis supplied.)

In the case at bar appellant’s complaint alleged in Paragraph 3 (J. A. 1) that five days was not a “reasonable” time within which to answer twenty-four charged offenses and obtain affidavits in reply thereto, where some of said charged offenses occurred years before. In the same paragraph appellant alleged that his notice of dismissal did not include “any and all reasons, specifically and in detail.” (J. A. 1) In Paragraph 4 of his complaint appellant alleged that he had not been furnished with a copy of all of the charges against him, (J. A. 3) in Paragraph 5 he alleged that he was deprived of a constitutional right to due process in being penalized twice for the same offenses, (J. A. 4) and in Paragraph 6 he alleged that the action against him was undertaken in bad faith. (J. A. 4)

The *Dewey* case cited above holds squarely that the question of “good faith” raises an issue of fact:

“The situation thus disclosed is one of a genuine issue as to whether or not appellee sought in *good faith* the particular premises * * *. This is a *material factual* issue.” (Emphasis supplied.)

Appellant contends that his allegations relating to “reasonable time”, “any and all reasons, specifically and in detail”, “copy of such charges”, and the question of good

faith, all, like the analogous questions of negligent acts or libellous words, present factual issues which must be determined by a trier of fact in the light of the evidence presented. Appellant's legal rights depend upon these factual issues.

Appellees' did not file an answer in the trial court, but simply moved for summary judgment. Therefore, appellant's allegations, except, perhaps as controverted by affidavits, must be taken as true. *Federal Rules of Civil Procedure 8(d)*. Accordingly, the trial court erred in granting appellees' motion for summary judgment.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be reversed.

CARL L. SHIPLEY,
Attorney for Appellant,
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July 15, 1953.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,776

PHILIP GOLDMAN, *Appellant*,

v.

PHILIP YOUNG, Chairman, U. S. Civil Service Commission, and ARTHUR E. SUMMERFIELD, Postmaster General, *Appellees*.

Appeal from the United States District Court for the
District of Columbia

JOINT APPENDIX

1

Filed Sept. 8, 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4008-'52

PHILIP GOLDMAN, 29222 Grand River, Farmington, Michigan, *Plaintiff*,

vs.

JESSE M. DONALDSON, Postmaster General, Post Office Department, Washington, D. C., and ROBERT RAMSPECK, Chairman, and members of the United States Civil Service Commission, Washington 25, D. C., *Defendants*.

Complaint for Declaratory Judgment

1. Plaintiff is a citizen of the United States and a resident of the State of New York. Defendants are public officials, charged with the operation of the Federal Post Office Department and the United States Civil Service Commission. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. Plaintiff is an honorably discharged disabled veteran, with a present war-service-connected disability of 30%, as determined by the Veteran's Administration, and is thus entitled to benefits of the Veteran's Preference Act of 1944 (5 U.S.C.A., Para. 851-869). He was employed as a regular mail carrier in the United States Post Office, Jamaica, New York, from July 9, 1939 to October 9, 1951, and is thus entitled to the benefits of the Act of August 24, 1912, (5 U.S.C.A., Para. 652 et seq.).

3. On August 17, 1951, the Post Office Department notified plaintiff by letter that he was charged with ten charges of excess use of office time in the performance of his duties; two charges of improper handling of mail; six charges of delaying the mail; four charges of insubordination; a charge of failure to wear the proper uniform; and a charge

2 of failure to conform to Post Office Department regulations. Said letter informed plaintiff that he must reply to these twenty-four charged offenses, many of which were alleged to have occurred many years earlier, within five days. Said action of the Post Office Department was in violation of 5 U.S.C.A. Para. 652 et seq., which provides that plaintiff "shall be allowed a reasonable time for filing a written answer to such charges, with affidavits", and in violation of 5 U.S.C.A. Para. 863, which provides that plaintiff "shall be allowed a reasonable time for answering personally and in writing, and for furnishing affidavits in support of such answer". Said action was in violation of 5 C.F.R. 22.2 (b), which provides "* * * the reasonable time required shall depend on all the facts and circumstances of each case and be sufficient in all cases to afford the employee *ample* opportunity to prepare answers and secure affidavits." It was utterly impossible and unreasonable for plaintiff to prepare a written answer and obtain supporting affidavits within five days. Said action of the Post Office Department was in violation of the settled rule in *Deak vs. Pace*, 185 F. 2d 997, C.S.A.D.C. (1950), which indicates that "reasonable time", as defined in 5 U.S.C.A. 652 et seq., means thirty days. (5 U.S.C.A. Para. 653). Said action of the Post Office Department was in violation of 5 U.S.C.A. Para. 863, in that said charges did not include "any and all reasons, specifically and in detail", for the proposed action.

4. On September 8, 1951, plaintiff was notified by the Post Office Department of its final decision to remove him, effective October 9, 1951. Plaintiff appealed to the Regional Director, Second United States Civil Service Region, who, on December 28, 1951, held a hearing on said action. At that hearing, and for the first time, plaintiff was confronted with a large number of affidavits, containing numerous additional charges, prepared by defendant Post Office Department. Said action of defendant, withholding said affi-

Court that there is no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law, it is, this 12th day of March, 1953,

ADJUDGED, ORDERED AND DECREED that defendant's motion for summary judgment be, and the same is hereby, granted.

/s/ LETTS, Judge

* * * * *

8

Filed Mar. 17, 1953

Notice of Appeal

Notice is hereby given this 12th day of March, 1953, that the above plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 12th day of March, 1953, granting a summary judgment in favor of defendant against said plaintiff.

CARL L. SHIPLEY

Attorney for Plaintiff

23

Exhibit

U. S. CIVIL SERVICE COMMISSION

SECOND U. S. CIVIL SERVICE REGION

OFFICE OF THE DIRECTOR, NEW YORK, N. Y.

APPEAL OF PHILIP GOLDMAN

UNDER SECTION 14 OF THE VETERANS' PREFERENCE ACT
OF 1944

Mr. Philip Goldman, 466 West Kirby, Detroit, Mich., appealed to this office under the provisions of Section 14 of the Veterans' Preference Act of 1944 from the adverse action of the Post Office Department, U. S. Post Office, Jamaica, N. Y., in separating him from the position of Regular Carrier for cause. Based upon documents con-

tained in the file, it was determined that the appellant met the requirements for entitlement to appeal within the meaning of the above-mentioned Act. Accordingly, an investigation was conducted by this office as to the facts and circumstances surrounding his removal, and pertinent records on file at the United States Post Office, Jamaica, N. Y., and at the Post Office Department, Washington, D. C., were secured and incorporated in the report of investigation.

By letter dated August 17, 1951, the appellant was notified by the Post Office Department Inspection Service that in accordance with Section 135.43 of the Postal Laws and Regulations (5 US Code 652), he was being charged with offenses considered to be against the interest of the Postal Service and, therefore, it was necessary that his removal or other disciplinary action be considered by the Post Office Department in order to promote the efficiency of the Postal Service. The letter listed ten charges of excessive use of office time in the performance of his duties; two charges of improper handling of mail; six charges of delaying the mail; four charges of insubordination and engaging in altercations with his supervisor; a charge of failure to wear the proper uniform; and a charge of failure to comply with Post Office regulations. Mr. Goldman was informed of his right to reply to the charges within five days of their receipt and further that the proposed adverse action would not become effective until at least thirty days after his receipt of the notice.

The appellant submitted a detailed reply to the letter of charges on August 20, 1951, in which he denied that he had used excess office time during the past six months. The appellant also alleged that no mail was ever wilfully detained by him. Mr. Goldman pointed out that in his long years of service with the Post Office he had been under the direct supervision of twenty-six different supervisors and that his record of service would establish that he had not had any difficulties with any of them.

Subsequently, by letter dated October 8, 1951, from the Assistant Postmaster General, Mr. Goldman was notified of the Department's final decision to remove him. His removal was made effective October 9, 1951.

A review of the appellant's personnel file discloses that the appellant first entered on duty on December 10, 1936 as a substitute carrier. He was appointed a regular carrier on July 9, 1939. Except for the appellant's absences for military service and leave without pay to attend school,
24 Mr. Goldman has served continuously from that date until the effective date of his removal, October 9, 1951.

The file in this case contains copies of the individual Forms 3991, Report of Errors, Misconduct or Meritorious Service, which were furnished to the appellant concerning each of the offenses with which Mr. Goldman has been charged by the agency. The appellant's replies to these Forms and his additional correspondence, addressed to the Postmaster at the Jamaica Post Office and also to Department officials in Washington, D. C., has been included in the record. In addition, there are set forth copies of affidavits executed by the following supervisory employees of the Jamaica Post Office, which were sworn to before Post Office Inspector N. A. Myers: Carl E. Abrahamson, Patrick J. Gallagher, Chester W. Kelsey, Thomas J. Malone, Robert J. Sweeney, Thomas A. Acker, William Stillwell, and Wilbur S. Carman. In these various affidavits the persons named commented on various offenses which formed the basis for the charges set forth in the letter of charges and with which these individuals were personally familiar. An affidavit was also furnished by Mr. Gallagher, the Senior Assistant Superintendent of Mails at the Jamaica Post Office to the Commission's representative, in which he listed information pertaining to the ten charges having to do with excess office time. All of this information has been carefully reviewed and considered in reaching a decision in this case but will not be set forth in the body of this decision.

Mr. Goldman was afforded a personal hearing at the Second Regional Office on December 28, 1951. The Post Office Department, although notified of the hearing date, did not send a representative. Mr. Goldman was represented by Mr. Samuel Resnicoff, Attorney at Law. Mr. Resnicoff contended that Mr. Goldman's removal had been improperly accomplished in violation of the Veterans' Preference Act of 1944, in that he had not been given a full thirty days in which to submit his reply to the charges preferred against him. Mr. Resnicoff cited the decisions in the Federal Courts in the cases of *Stringer vs. United States* and *Deak v. Pace*, as sustaining his allegation in this respect. The appellant's representative also objected to the inclusion in the record of the appeal of the affidavits obtained by Post Office Inspector Myers from the employees of the Post Office Department, which were referred to previously in this decision. Mr. Resnicoff contended that Mr. Goldman was being confronted with these affidavits for the first time at the hearing of his appeal and that he should have had the opportunity to review them before action was taken by the Department to separate him. Mr. Resnicoff also objected to the inclusion in the letter of charges of the first twelve charges on the ground that Mr. Goldman had previously received a letter of charges from the Jamaica Post Office on November 16, 1950, in which he was informed that a total of 813 demerits were being imposed upon him for the same offenses which formed the basis of these twelve charges. The appellant's representative argued that the imposition of the demerits was a penalty, and therefore, to charge him again would constitute double jeopardy at this time. Mr. Goldman then discussed each of the remaining twelve charges and gave his explanation for each one. Inasmuch as a verbatim transcript has been prepared of the testimony adduced at the hearing, the information furnished will not be summarized in the body of this decision.

The action of separation in this case was based upon twenty-four charges consisting of using excessive office time in the performance of duties, the improper handling of mail, delaying of mail, insubordination and engaging in an altercation with a supervisor, failure to wear the proper uniform, and failure to comply with Post Office regulations. The agency based its removal action on a letter of charges, dated August 17, 1951, and Mr. Goldman was given the opportunity to answer these charges within five days of their receipt. Final decision was not made effective until October 9, 1951, and the appellant was advised of the agency's decision, by letter received by him on that day. It is considered that the procedures required by Part 22 of the Commission's regulations, concerning the nature of the proposed adverse notice, length of notice period, and opportunity to reply to the charges, were complied with by the Post Office Department.

The appellant's contention that the imposition of the first twelve charges constituted double jeopardy, in that he had previously received a penalty of demerits for them, is not considered to be valid. While the record does reflect that penalties of demerits were imposed by the Postmaster at the Jamaica Post Office at the time each of the individual offenses is alleged to have occurred, there is no evidence that the Department took any penalty action against Mr. Goldman other than the recording of the demerits on his record. The objections of the appellant's representative to the inclusion in the record of the affidavits from Post Office employees is not valid. Mr. Goldman visited the Second Regional Office and examined the record prior to the day of the hearing afforded him at the Regional Office and was given the opportunity to comment on those statements at that time. After careful consideration of the entire record, including the testimony furnished by the appellant at the

hearing, and the pertinent parts of the affidavits furnished by the appellant at the hearing, and the pertinent parts of the affidavits furnished by agency employees, it is considered that the charges preferred against the appellant have been substantiated by the weight of the evidence in the record.

In view of all the facts and circumstances in this case, it is the opinion of this office that the action of removal taken in Mr. Goldman's case was warranted and not in violation of any of his rights under Section 14 of the Veterans' Preference Act of 1944. It is considered that the action of removal was for such cause as would promote the efficiency of the Service, and there is no evidence of bias, prejudice or discrimination on the part of the operating officials of the Post Office Department. It further appears that the action was reasonable and not arbitrarily or capriciously taken. It is, therefore, the decision of this office that no change be made in the personnel action of the Post Office Department in separating Mr. Philip Goldman from the position of Regular Carrier for cause.

Mr. Goldman and the Post Office Department are privileged, in the event that either party is not satisfied with this decision, to appeal further to the Commissioners of the U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days from the day of receipt of this decision.

26 No further appeal from this decision will be entertained from either Mr. Goldman or the Post Office Department, unless it is submitted to the Commissioners, U. S. Civil Service Commission, within the time limit stated above. Notification of the further appeal should be given to this office in order that the file of the case may be transmitted to the Commissioners. Regulations provide that the Commission's Board of Appeals and Review will review the record on the appeal and grant a hearing in its discretion. If a hearing is desired by the preference eligible or the

agency, a specific request for such hearing should be made at the time of the further appeal and substantial reasons stated for its necessity. Pertinent evidence and representations in writing should be submitted with the appeal to the Commissioners.

JAMES E. ROSSELL
Regional Director

Jan. 14, 1952

Case No. 11,776

BRIEF FOR APPELLEES AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,776

PHILIP GOLDMAN, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL AND PHILIP
YOUNG, CHAIRMAN, AND MEMBERS OF THE UNITED STATES
CIVIL SERVICE COMMISSION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LEO A. ROVER,

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United States Court of Appeals

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PHILIP GOLDMAN, APPELLANT

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ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL AND PHILIP
YOUNG, CHAIRMAN, AND MEMBERS OF THE UNITED STATES
CIVIL SERVICE COMMISSION, APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court granting the appellees' motion for summary judgment. On September 8, 1952, appellant filed a complaint in the District Court for a declaratory judgment to determine his rights to employment by the United States, alleging, in substance, that he had been unlawfully discharged from his government employment in violation of Section 14 of the Veterans' Preference Act of 1944, 5 U. S. C. 863, and Civil Service Regulations, 5 C. F. R. 22.2(a) and (b) (J. A. 2-6).¹ The record shows that appellant, an honorably discharged

¹ Appellant also alleges violation of Title 5 U.S.C. § 652 and pertinent regulations thereunder, which section applies to non-veteran classified civil service employees. The procedural requirements under this section are substantially the same as those under section 863.

disabled veteran, was employed as a regular mail carrier in the United States Post Office, Jamaica, New York, from July 9, 1939 until October 9, 1951, except for absences for military service and to attend school (J. A. 2, 8). By letter of August 17, 1951, appellant was given a notice of proposed adverse action charging 24 specific offenses which necessitated consideration of his removal or other disciplinary action to promote the efficiency of the service (J. A. 2, 7; App. 13-16). Appellant was informed that he had the right to answer the charges within five days from the receipt of the letter, personally and in writing, and to furnish affidavits in support of such answer (J. A. 3, 7; App. 16). Appellant was further informed that if additional time was needed it would be granted upon written application showing the necessity therefor (App. 16). No adverse action taken, if any, was to take effect until at least thirty days after receipt of the notice (J. A. 7; App. 16).

By letter dated August 20, 1951, without requesting more time to answer, appellant replied to the charges in detail (App. 16-19). Thereafter appellant was removed from his position as mail carrier effective October 9, 1951 (J. A. 3, 8). On December 28, 1951, appellant was afforded a personal hearing by the Second Regional Office of the Civil Service Commission (J. A. 3, 9). He was represented by counsel at the hearing (J. A. 9). On January 24, 1952, the Regional Director issued his report containing extensive findings of fact, conclusions of law and recommendation that the agency action be approved. (J. A. 6-12). A hearing by the United States Civil Service Board of Appeals and Review was held on February 20, 1952 (App. 19), and, on May 7, 1952, the board issued a decision upholding the action of the Second Regional Office (App. 19-20).

Appellant then brought the instant action (J. A. 2-6) and on November 18, 1952, appellees filed a motion for summary judgment (J. A. 5), with supporting exhibits (J. A. 6-12; App. 13-20). The motion was granted on March 12, 1952 (J. A. 5, 6). From this order appellant now prosecutes this appeal (J. A. 6).

STATUTE AND REGULATIONS INVOLVED

Title 5 U. S. C. § 863 provides as follows:

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends. *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

Title 5 C. F. R. § 22.2 provides, in pertinent part, as follows:

Notification of proposed actions; charges and opportunity for answer—

(a) *Advance written notice of thirty days.* No employee covered by the regulations in this part shall be discharged, suspended for more than thirty (30) days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the employee whose discharge, suspension for more than thirty (30) days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty (30) days advance written notice stating any and all reasons, specifically and in detail, for any such proposed action. The advance notice which is required when a proposed action is sought by an employing agency shall be submitted to the employee at least thirty (30) days before the effective day of such proposed action except that: * * *

(b) *Reasonable time to answer.* A reasonable time shall be allowed employees for answering personally and in writing, charges and notifications of proposed adverse actions, and for furnishing affidavits in support of such answers, and the reasonable time required shall depend on all the facts and circumstances of each case, and be sufficient in all cases to afford the employee ample opportunity to prepare answers and secure affidavits.

SUMMARY OF ARGUMENT

The District Court correctly awarded summary judgment to the Postmaster General and to the Chairman and members of the Civil Service Commission, appellees, since it clearly appeared from the record that the procedural requirements of Section 14 of the Veterans' Preference Act of 1944, 5 U. S. C. 863, and Civil Service Regulations, 5 C. F. R. 22.2 (a) and (b), had been substantially accorded appellant.

ARGUMENT

I

The Lower Court Correctly Granted Appellees' Motion for Summary Judgment Since the Record Showed That the Procedural Requirements of the Statute Pertaining to the Discharge of a Civil Service Employee with Veterans' Preference Were Followed.

1. *The charges against appellant contained in the Letter of Charges were specific and in detail.* Notice of proposed action was given appellant by a letter, dated August 17, 1951 (App. 13-16). The letter listed ten charges of excessive use of office time in the performance of his duties; two charges of improper handling of mail; six charges of delaying the mail; four charges of insubordination and engaging in altercations with his supervisor; a charge of failure to wear the proper uniform; and a charge of failure to comply with Post Office regulations. Where pertinent, names, addresses, places, dates and periods of time were given as to each offense (App. 13-16).

This Court has previously had occasion to rule upon the sufficiency of information contained in a letter of charges. See: *Blackmon v. Lee* (1953), — U. S. App. D. C. —, 205 F. 2d 13; *Terry v. Stevens* (1953), — U. S. App. D. C. —, 203 F. 2d 219; *Deviny v. Campbell* (1952), 90 U. S. App. D. C. 171, 194 F. 2d 876; and *Bailey v. Richardson* (1950), 86 U. S. App. D. C. 248, 182 F. 2d 46, affirmed 341 U. S. 918. The standard of specificity required in a notice of proposed action is that "the information must be sufficient to inform the employee with reasonable certainty and precision of the cause for his removal." *Deak v. Pace* (1950), 88 U. S. App. D. C. 50, 52, 185 F. 2d 997, 999. Applying this test to the letter of charges sent to appellant it is readily apparent that the standard has been met. It is equally apparent from appellant's reply that he fully understood the charges against him and was able to answer them in detail. (App. 16-19). It follows that appellant's contention that he was not informed of the charges specifically and in detail is without factual basis.

2. *Appellant was furnished with a copy of any and all charges against him.* Any and all charges against appellant were set forth in the letter of August 17, 1951 (App. 13-16). Appellant, however, objected to the inclusion in the record at the hearing before the Civil Service Second Regional Office of certain affidavits of which he alleged he had no previous knowledge and had received no copy (J. A. 3-4). A copy of the charges, of course, is not tantamount to a copy of the evidence upon which the charges are based. The conduct of the employee is the basis for discharge, not the information given against him, and appellant does not allege in his complaint or in this appeal that the charges are invalid or without merit. Indeed, the record shows that appellant could, and did, see the affidavits before the hearing (J. A. 10). Appellant admits receipt of the letter of charges (J. A. 3). Such letter contained in descriptive detail all of the offenses for which he was being charged. His contention that he was not furnished with a copy of the charges against him is, therefore, without merit.

3. *Appellant was given a reasonable time within which to answer the charges.* The notice of proposed action contained the following language (App. 16):

You have a right to answer these charges within five days from the receipt of this notice of proposed adverse action personally and in writing and to furnish affidavits in support of such answer. If additional time is needed it will be granted upon written application to me showing the necessity. * * *

The charges were based on offenses which occurred between September 14, 1950 and July 3, 1951, a period of ten months (App. 13-16).² Appellant now contends that he was

² Appellant was even forewarned of some of the charges by prior receipt of 813 demerits for conduct upon which these charges were predicated. His contention that this constitutes "double jeopardy" is without merit inasmuch as the giving of demerits is not adverse action within the meaning of the Veterans Preference Act. Further, such principles as double jeopardy, res judicata and equitable estoppel have no place in administrative proceedings. *Wallace Corp. v. NLRB*, 323 U.S. 248; *Churchill Tabernacle v. F.C.C.*, 81 U.S. App. D.C. 411, 160 F. 2d 244.

not provided a reasonable time within which to answer such charges (J. A. 3). As hereinabove indicated, the record shows that appellant was given five days in which to answer (App. 16), and the weakness of his present contention is shown by the fact that he did, in fact, file a written answer in considerable detail (App. 16-19). Further, appellant failed to request more time to answer the charges although he was clearly advised he could do so (App. 16).

This Court has previously held five days to be a reasonable time to answer a letter of charges. *Levine v. Farley* (1939), 70 App. D. C. 381, 107 F. 2d 186, cert. denied 308 U. S. 622. In *Mulligan v. Dunlop*, 108 F. Supp. 296, 298, (D. C. D. C., 1952), a similar case, the court disposed with this point by stating:

Nor is there any merit to plaintiff's position that he was not given a reasonable time to answer the charges. He made no request for an extension of time. He apparently had sufficient time to answer as he was able to reply to the charges in detail.

Under the circumstances of the instant case, the same comment applies, and shows that appellant's allegation of lack of reasonable time to answer the charges is unfounded.³

4. *An unsupported allegation of bad faith does not present a genuine issue of material fact.* The record is utterly devoid of any evidence of bad faith on the part of appellees. Moreover, in *Bailey v. Richardson*, *supra*, this Court said, *inter alia* (86 U. S. App. D. C. at 266):

The line of cases in which this court has said that courts will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements, is unvaried. As early as 1904, this Court said that the rule had been announced so many times as not to require citation of authority. In *Levy v. Woods* we said, quoting the Court

³ While an administrative interpretation is not binding on this Court, it will be noted that the United States Civil Service Commission Board of Appeals and Review states: 'In cases of appeals arising under Section 14 of the Veterans' Preference Act of 1944, the Commission has consistently held that five days affords reasonable opportunity for an employee to answer charges; * * *' (App. 19).

of Claims, "The allegations that the plaintiff was innocent of the charges preferred against him * * * and that the investigation which resulted in his removal was biased, prejudiced, and unfair, are immaterial."

It is elementary that summary judgment will not be granted where there is a genuine issue as to any material fact, and the rule naturally applies to cases involving civil service employees as well as to other types of cases. *Hunter v. Mitchell* (1950), 86 U. S. App. D. C. 121, 180 F. 2d 763, Appellant relies upon *Dewey v. Clark* (1950), 86 U. S. App. D. C. 137, 180 F. 2d 776, wherein this Court held, in an action under the District of Columbia Emergency Rent Act, that a landlord's allegation that she desired certain premises in good faith for her immediate and personal use and occupancy as her residence, and the denial of that allegation, presents a genuine issue of material fact. However, the Court has this to say with reference to granting summary judgment (86 U. S. App. D. C. at 143):

(3) There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations defeat summary judgment. On this point the cases decided by this Court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract.

The uncontroverted facts appearing in the record conclusively establish that appellant was afforded his full statutory rights, and there is nothing but a bare allegation that appellees were not acting in good faith. Since it is beyond the jurisdiction of the District Court to review the evidence upon which a discharge is based when the statutory procedures have been followed (*Terry v. Stevens, supra; Deviny v. Campbell, supra, Carter v. Forrestal* (1949), 85 U. S. App. D. C. 53, 175 F. 2d 364, *Levine v. Farley, supra*), there remained no genuine issue of material fact to be decided and

the District Court properly granted summary judgment for appellees.

CONCLUSION

WHEREFORE, it is respectfully submitted that the order of the District Court should be affirmed.

LEO A. ROVER,
United States Attorney;
LEWIS A. CARROLL,
CATHERINE B. KELLY,
Assistant United States Attorneys.

APPENDIX

EXHIBIT A

Copy

Post Office Department
Inspection Service
Office of Inspector

Case No. 301135-C

N. A. Myers, Inspector, JHF.
Jamaica, New York, August 17, 1951

REGISTERED MAIL

Mr. Philip Goldman,
53-40 214th Street,
Flushing, New York.

DEAR MR. GOLDMAN:

In accordance with section 135.43 Postal Laws and Regulations (5 U. S. Code 652), section 14 of the Veterans' Preference Act of 1944, and pertinent material in the Federal Personnel Manual, you are charged with the following offenses considered to be against the interest of the Postal Service. Therefore it is necessary that your removal or other disciplinary action be considered by the Post Office Department to promote the efficiency of the Postal Service:

Charge No. 1. On September 14, 1950, you used 1 hour and 17 minutes excess office time in performing the duties on Route 324 emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 2. On September 14, 1950, you failed to wear a regulation shirt and tie while officially employed as a carrier;

Charge No. 3. On September 15, 1950, you used 32 minutes excess office time in performing the duties on Route No. 324 emanating from the Queens Village Station of the Jamaica, New York, post office;

Charge No. 4. On September 15, 1950, while you were officially employed as a carrier on Route No. 324 you said to Foreman W. J. Edwards, who was surveying the route, "You tried to have me fired but it did not succeed. You can make out a ticket for insubordination, I don't care, I can lie out of it."

Charge No. 5. On September 15, 1950, while you were carrying Route No. 324 you asked Foreman W. J. Edwards

if you could stop for coffee. He refused this request. You then informed Mr. Edwards you were going to stop anyway.

Charge No. 6. On October 25, 1950, you used 1 hour and 37 minutes excess office time in performing the duties on Route No. 324 emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 7. On October 26, 1950, you used 57 minutes excess office time in performing the duties on Route No. 324 emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 8. On October 27, 1950, you used 1 hour and 8 minutes excess office time in preparing the mail for delivery on Route No. 324, emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 9. On October 28, 1950, you used 45 minutes excess office time in preparing the mail for delivery on Route No. 324, emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 10. On October 31, 1950, you used 37 minutes excess office time in performing the duties on Route No. 324 emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 11. On November 1, 1950, you used 21 minutes excess office time in performing the duties on Route No. 324 emanating from the Queens Village Station of the Jamaica, N. Y. post office;

Charge No. 12. On November 1, 1950, you said to your immediate supervisor, Clerk in Charge Carl E. Abrahamsen, "If you're going to throw the book at me, I'll throw it right back at you."

Charge No. 13. On November 2, 1950, you used 14 minutes excess office time in performing the duties on Route No. 324 emanating from the Queens Village Station of the Jamaica, N. Y., post office;

Charge No. 14. On February 16, 1951, you used 30 minutes excess office time in performing the duties on Route 68, emanating from the main office at Jamaica, N. Y.

Charge No. 15. On May 8, 1951, you wilfully detained and delayed 25 first-class letters and 127 pieces of third-class matter properly addressed for delivery on Route No. 501, which you were carrying. You returned to the Howard Beach Station from which this route emanates, at 2:28 p. m., although you did not end your tour of duty until 3:08 p. m. at which time you had worked 7 hours and 57 minutes;

Charge No. 16. At 10:35 a. m. on May 8, 1951, while carry-

ing Route No. 501 you failed to place the mail in the receptacle at 99-09 160th Avenue, but threw it on the stoop instead;

Charge No. 17. On June 16, 1951, you wilfully detained and delayed 52 first-class letters and 24 pieces of mail of other classes all addressed for delivery on Route No. 501 emanating from Howard Beach Station of the Jamaica, N. Y. post office, which you were carrying. You did not leave the station until 9:21 a. m., although you rang out at 9:06 a. m. on the time clock as your leaving time.

Charge No. 18. On June 25, 1951, you read a patron's newspaper from 1:32 p. m. until 1:41 p. m. on the stoop at 161-04 96th Street, while carrying Route No. 501, emanating from Howard Beach Station of the Jamaica, N. Y., post office;

Charge No. 19. On June 26, 1951, at 12:55 p. m., you threw the mail onto the front stoop at 162-23 98th Street, instead of placing it in the receptacle. This was on Route No. 501, which you were carrying from Howard Beach Station;

Charge No. 20. On June 26, 1951, while carrying Route No. 501, emanating from the Howard Beach Station of the Jamaica, N. Y., post office, you spent from 1:20 p. m. until 1:40 p. m. reading a patron's newspaper while on the stoop at 160-28 97th Street.

Charge No. 21. On June 27, 1951, you wilfully detained and delayed 43 pieces of third-class matter and 7 pieces of first-class matter all addressed for delivery on Route No. 501, which you were carrying. You returned to the station at 2:36 p. m. although you were scheduled to end your tour of duty at 3:15 p. m. You did not complete a Form 1571, curtailment slip, for reference to the supervisor;

Charge No. 22. On July 3, 1951, you wilfully detained and delayed 44 pieces of third-class matter, 11 pieces of second-class matter and 4 pieces of first-class matter, all addressed for delivery on Route No. 501 which you were carrying. You returned to the station at 2:36 p. m., although you were scheduled to end your tour of duty at 3:15 p. m. You failed to deliver this mail even though you walked past the addressees' homes.

Charge No. 23. Between April 2, 1951 and July 3, 1951, you failed to complete any Forms 3982, Change of Address, for removals submitted by patrons who were served by Route No. 501 emanating from Howard Beach Station, Jamaica, N. Y.

Charge No. 24. On June 16, 1951, you screamed at Superintendent T. J. Malone, Howard Beach Station, of the

Jamaica, N. Y., post office, after he had instructed you to deliver mail to 102-28 159th Road and 164-07 99th Street. In each instance, you claimed there was no authorized mail receptacle.

You have a right to answer these charges within five days from the receipt of this notice of proposed adverse action personally and in writing and to furnish affidavits in support of such answer. If additional time is needed it will be granted upon written application to me showing the necessity. In case an adverse decision is made in your case, adverse action will not take effect until at least 30 days after the receipt of this notice by you.

Very truly yours,

Post Office Inspector.

EXHIBIT B

Copy

53-40 214 Street,
Bayside 64, New York.
August 20, 1951.

Mr. N. A. Myers
Post Office Inspector
Jamaica 1, New York

My dear Sir:

I beg to reply to your letter of August 17, 1951 with reference to the charges preferred against me.

The charges against me are mainly due to the following:

- (a) Excess office time
- (b) Delay of mail
- (c) Failure to place mail in receptacle
- (d) Verbal arguments with Supervisors

I am referring to the charges in the above order.

- (a) Excess office time

There has been no excess office time used for over six months now and on only one occasion in the past nine months.

(b) Delay of mail

The delay of mail was not ever wilfully detained. It has been my custom to return to the office at approximately 2:45 P.M., the regularly scheduled returning time. I have done this in order to allow sufficient time for casing mail received in the afternoon for the following day's delivery. The small handful of third class or junk mail which included some telephone bills on one occasion was curtailed in order to allow sufficient time to case up the bundles of mail that usually arrive in the afternoon. In this manner the record will confirm that I have rarely ever had to leave the office later than schedule the following morning and, as a result, I am able to get out on the street and effect an earlier delivery to the patrons. The delay of mail was not wilful on my part.

(c) Failure to place mail in receptacle

Both patrons at 99-09 160 Ave. and 162-23 98 St. informed me not to place magazines in the receptacles as they were torn on occasion. Both patrons informed me they were usually home when I came around and thus they would prefer that the magazines be put on the stoop as they usually came right out. Mail matter was placed in the receptacle.

(d) Verbal arguments with Supervisors

In the 14½ years since my appointment to the Post Office in 1936 I have, at one time or another, been under the direct supervision of the following Supervisors.

- | | |
|-------------------|-------------------|
| 1. Mr. Bentavegna | 14. Mr. Kelsey |
| 2. Mr. Gauth | 15. Mr. Tarantino |
| 3. Mr. Gribbin | 16. Mr. Campbell |
| 4. Mr. Haskins | 17. Mr. Cavallino |
| 5. Mr. Stillwell | 18. Mr. Lane |
| 6. Mr. Carman | 19. Mr. Brady |
| 7. Mr. Green | 20. Mr. Klein |
| 8. Mr. Henshaw | 21. Mr. Juster |
| 9. Mr. Crowley | 22. Mr. Fox |
| 10. Mr. Vago | 23. Mr. Pfund |
| 11. Mr. Kabus | 24. Mr. Baylis |
| 12. Mr. Gallagher | 25. Mr. Pesch |
| 13. Mr. McNiff | 26. Mr. Tuttle |

I believe I have work for other Supervisors but I do not recall their names. The record will indisputably confirm that I have never had any verbal arguments with any of

these men. Thus, one can easily see that in all of the 14½ years since my appointment I have worked under may (sic) different kinds of Supervisors, some for short periods of time and still others for long periods of time, without any verbal arguments taking place.

I volunteered in 1942 for service in the Navy shortly after the outbreak of hostilities in World War II.

I was honorably discharged in 1945 from the Navy with a 30% service-incurred nervous disability which has made me a rather high-strung, emotional human being.

Letters have been sent to Postmaster Rosenquest from the Veterans Administration and the Winchester Clinic of Queens which indicate that I have been undergoing psychiatric and psychological treatment for more than a year. I have been informed by Dr. G. W. Savitsecus, who has been authorized by the Veterans Administration to treat me, that progress has been made in my case and that a full recovery should be effected within the near future.

I wish to bring to your attention that, as previously stated, I am a disabled veteran having received a 30% disability at the time of my honorable discharge from the Navy and said disability payments are still being received by me.

I was appointed from the Letter Carrier list in 1936 during the last depression and served many long hours at 65¢ per hour before my appointment to Regular Carrier in 1939. I worked diligently from 6 A.M. till midnight and later on many occasions. All told I have 14½ years seniority, 14½ years that I would hate to see jeopardized at this stage in my life as I need my job because of many family responsibilities.

My Father, because of his health, was forced to stop working over 10 years ago. Both my Father and Mother are over 65 and in poor health. They do not work and have depended up(sic) me these last 10 years for the money I have contributed to aid their support.

I am married and the sole support of my family. My wife is an unemployed housewife.

Having spent practically all of my working life with the Post Office it is the only job I know and the only job for which I am qualified.

If I ever am removed from the Postal Service after all of these 14½ years I would be disgraced in the eyes of my family and friends. Furthermore, such a dismissal would be a permanent blot on my record and would prevent me from ever securing a worthwhile job, let alone any other type of Civil Service job.

The aforementioned facts, I feel, warrant leniency in the consideration of the charges.

Respectfully yours,

(S.) PHILIP GOLDMAN,
*Carrier—Rt. 501,
 Howard Beach Station.
 (Jamaica, N. Y.)*

EXHIBIT C

Copy

BAR:HCB:hbw
 May 7, 1952

Mr. Samuel Resnicoff
 Counselor at Law
 280 Broadway
 New York City, New York

Dear Mr. Resnicoff:

Reference is made to the appeal in behalf of your client, Mr. Philip Goldman, under Section 14 of the Veterans' Preference Act of 1944 from the decision of the Second U. S. Civil Service Region sustaining the action taken by the Post Office Department in separating him from the position of Regular Carrier, Jamaica, New York Post Office, effective October 9, 1951 as a result of charges preferred against him by letter of August 17, 1951.

The decision of the Second Region was based on the considerations set forth in its memorandum of January 14, 1952, copy of which was furnished you.

The Commission's Board of Appeals and Review, after careful consideration of all the facts and circumstances in this case including the representations made in behalf of Mr. Goldman in the hearing before the Board on February 20, 1952, has found that the decision of the Second Region was warranted and that decision, therefore, is affirmed. In arriving at this decision, consideration was given to your representations relative to reversible error in this case but no error was found as to the procedures utilized in this case. In cases of appeals arising under Section 14 of the Veterans' Preference Act of 1944, the Commission has consistently held that five days affords reasonable opportunity for an employee to answer charges; consideration was given to the

specific charges and answer to those charges as preferred against Mr. Goldman; the taking of action on the basis of demerits does not constitute "double jeopardy" since the assessing of demerits, in itself, was not an adverse action; and the charges preferred against Mr. Goldman are considered to warrant the action taken by the agency.

In accordance with the Commission's Rules and Regulations pursuant to further appeals under Section 14 of the Veterans' Preference Act of 1944, no further consideration will be given this case unless new and material evidence is submitted.

Very respectfully,

ENS—5-6-52

E. NEWTON STEELY,
Acting Chairman,

Board of Appeals and Review.

cc: Mr. Philip Goldman
466 West Kirby
Detroit 2, Michigan

cc: Honorable Joseph J. Lawler
Assistant Postmaster General
Bureau of Post Office Operations
Post Office Department
Washington 25, D. C.

cc: Postmaster
U. S. Post Office
Jamaica, New York

cc: Second Region

cc: Service Record Division
DOB 5/19/16

